

## COMPLIANCE BOARD OPINION 93-11

November 30, 1993

*Mr. Sean O'Sullivan*

The Open Meetings Compliance Board has considered your complaint dated August 27, 1993, in which you allege that a meeting of the Mayor and Council of Ocean City on August 10, 1993, with the Worcester County Commissioners violated the Open Meetings Act.

Your complaint states that the "primary topic of conversation at the gathering was the possible dissolution of the Worcester County Sanitary Commission [WCSC], a semi-independent arm of the county." Your letter indicates that the Ocean City government favors the dissolution, "because town leaders hope to regain control of the town's sewers, which are currently run by the WCSC." "The proposed transfer of control of the Ocean City's sewers" – formally called Sanitary District One – "from the WCSC to town is hardly a secretive matter or one that should require an executive session. To the extent that there are personnel and land acquisition matters involved with such a transfer, both the personnel and land involved are public and therefore any debate about transfers would not compromise any deal by making the matters public." Your letter indicates that the County Commissioners were amenable to your presence during the discussion but that "Ocean City had voted to close the session and I was asked to leave." You conclude "that the press was barred from this meeting ... not to protect the privacy of personnel or keep legal and land matters from being compromised but instead to keep debate about a public issue in private."

In a timely response on behalf of the Mayor and City Council of Ocean City, City Solicitor Guy R. Ayres, III, states that "[t]he purpose of the August 10, 1993 meeting with the Worcester County Commissioners was to discuss specific legal matters, contractual matters and personnel matters associated with the potential transfer of Sanitary District One to the Mayor and City Council of Ocean City ...." The "legal matters" said to have been discussed include charter amendments and ordinances; transfers of real estate, easements, and rights of way; transfers of personal property and permits; assumption of contractual obligations; assumptions of outstanding bonds; bond ratings and impact on borrowing ceiling; refunding bonds; pension plans; and other related legal matters. The "contractual issues" involved contracts for services between the county and the city if the dissolution and transfer were to occur, and well as issues about the City's assumption of existing contractual, bond, and pension obligations. The "personnel issues" involved "which employees go where," and salaries, vacations, health plans, and pension plans.

Both a "synopsis" of the August 10 meeting and a statement about the closed meeting in the minutes of the next open meeting of the Mayor and City Council indicate that the Council voted to adjourn to a closed session "to discuss legal, personnel, and contractual matters." The only specific citation of authority for closing the meeting, however, appears in a "notice of closed session of Mayor and City Council of Ocean City," which we take to be the "written statement" made prior to the closing of the meeting in accordance with §10-508(d)(2). This notice indicates that two exceptions were actually invoked: §10-508(a)(1), the personnel exception; and 10-508(a)(7), the exception for consultation with legal counsel.<sup>1</sup>

Turning first to the "legal advice" exception, §10-508(a)(7) permits a public body to "consult with counsel to obtain legal advice" in closed session. From its initial opinion, the Compliance Board has taken the position that this exception "is to be narrowly construed to cover only the interchange between the clinic public body and its lawyer in which the client seeks advice and the lawyer provides it." Compliance Board Opinion 92-1, at 5 (October 15, 1992). The exception does *not* allow for closed discussion among members of the public body merely because an issue has legal ramifications. Nor does the exception apply to a discussion between the public body and anyone other than its lawyer. See Compliance Board Opinion 92-1, at 3. In other words, there is no exception for "legal matters" as such.<sup>2</sup>

The possible dissolution of the WCSC and the transfer of Sanitary District One to the City's control undoubtedly involves numerous legal issues, as Mr. Ayres suggested in his letter. The exception in §10-508(a)(7) would permit discussion in closed session to the extent that Mr. Ayres was asked to provide advice on any of these topics, but only to that extent. If there was discussion between the Mayor and City Council and the County Commissioners about any of the legal issues identified in Mr. Ayres' letter – that is, if the discussion strayed away from advice from Mr.

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<sup>1</sup> Mr. Ayres' letter to the Compliance Board suggests that the Mayor and City Council might also have intended to invoke §10-508(a)(3), the exception dealing with "the acquisition of real property for a public purpose." But since that exception was not identified in the statement accompanying the vote to close the meeting, nor, apparently, was it in fact specifically voted on prior to the closed session, the Mayor and City Council cannot now rely on it in seeking to justify the closed session.

In addition, the Compliance Board notes that, contrary to §10-509(c)(2)(iii), the minutes of the next open meeting of the Mayor and City Council do not contain "a citation of the authority under this subtitle for closing the session." This requirement, like the requirement that the specific statutory authority be cited in the statement made prior to closing the meeting, is not an empty formality. The legislative intent is to ensure that public bodies will have focused on the text of the pertinent exceptions so as to understand the limits on permissible discussion in a closed session. Members of the public are also entitled to know specifically the exception on which the public body relies in closing a meeting.

<sup>2</sup> The Act contains a separate exception for discussion of pending or potential litigation. §10-508(a)(8). The litigation exception is not at issue here.

Ayres and instead became a government-to-government discussion – then the Act was violated. Indeed, the materials supplied by the City heighten the Compliance Board's concern that such a violation indeed occurred at the August 10 meeting. According to summary of the August 10 meeting set out in the subsequent minutes, "it was decided on a vote of 6 to 0 to share half the costs of a consulting study regarding the Sanitary Commission up to \$5,000 ...." Under no circumstances could this action be justified under the exception for legal advice. Moreover, the discussion with the County Commissioners preceding this vote would likewise have been beyond the limits of the exception. The Compliance Board is unable to make a judgment whether any other violations of this type occurred at the meeting.

With respect to the "personnel issues," §10-508(a) permits a closed discussion by a public body to discuss:

- (i) The appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation of appointees, employees, or officials over whom it has jurisdiction; or
- (ii) Any other personnel matter that affects one or more specific individuals.

Because the Mayor and City Council have no "jurisdiction" over the employees of the Sanitary Commission at present, there would have been no basis for the invocation of subparagraph (i) of this exception. In the Compliance Board's view, however, a discussion of the fate of specific WCSC employees, should the dissolution and transfer occur, would constitute "any other personnel matter that affects one or more specific individuals" and therefore would be encompassed by subparagraph (ii) of the exception. The Compliance Board cautions, however, that this exception applies only when "specific individuals" are being discussed. The exception does not permit closed discussion of decisions with respect to a broad category or class of personnel, where there is no discussion of the particular individuals who hold positions within the class.

OPEN MEETINGS COMPLIANCE BOARD

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